CHANG SIEW @ CHANG SIEW KEE & 2 ORS.

v.

CHANG SANG @ CHEN YEN SANG & ANOR.

HIGH COURT, SHAH ALAM
DATUK WIRA WAN YAHYA B. PAWAN TEH J
[ORIGINATING SUMMONS NO. 24-79 OF 1989]
29 FEBRUARY 1992

LAND LAW: Application for vacant possession - Order 89 RHC 1980.

PRACTICE AND PROCEDURE: Summary judgment - Order 89 RHC 1980 - Triable issues - Court resorting to O. 28 r. 4 RHC 1980 - Arguments in open court.

The plaintiffs brought an action by way of originating summons under O. 89 Rules of the High Court 1980 seeking vacant possession of land held under H.S.(M) 311B. P.T. No. 270 in the Daerah of Petaling, in the state of Selangor on the grounds that they were the owners of the said lands.

The defendants opposed the application *inter alia* on the grounds that they had entered the said lands on a licence and as such the question of their entitlement to remain on the land could not be disposed of by way of summary procedure.

The learned Judge proceeded under O. 28 r. 4 RHC 1980.

Held:

[1] The plaintiffs' father was the registered owner of the land and the defendant had by falsely representing that he was the sole beneficiary to the plaintiff's father's estate obtained Letters of Administration and transferred the plaintiff's father's land into his own name. The Letters of Administration was subsequently revoked by the Collector of Land Revenue and ownership restored to the plaintiff.

[2] There was no licence from any legally competent person at the time of the plaintiff's father's death given to the defendant, and, if at all the consent of the plaintiff's grandfather to the defendant's original entry was to be construed as a licence then that licence had been effectively terminated by the plaintiffs.

[3] The summary procedure provided under O. 28 r. 4 RHC 1980, was maintainable here, as both parties had been afforded the opportunity to present their evidence, *viva voce* and to argue the issue raised by the defendant fully in open court.

[Order for possession granted. Defendant to vacate the premises on or before 3 months].

Cases referred to:

Bristol Corpn. v. Persons unknown [1974] 1 All ER 596 ***(refd)***

Greater London Council v. Jenkins [1975] 1 ALL ER 354 ***(refd)***

Bohari bin Taib & Ors. v. P.T.G. Selangor [1991] 1 MLJ 343/[1991] 1 CLJ 647 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 28 r. 4, O. 89

Other sources referred to:

Rules of the Supreme Court, O. 113

For the Plaintiffs - R. Devadason; M/s. Devadason & Devadason

For the Defendants - S.T. Ravindran; M/s. Lim Soh Wah & Partners

JUDGMENT

Wira Wan Yahya b. Pawan Teh J:

This application under O. 89 which originated in Originating Summons was directed to be heard in Open Court pursuant to O. 28 r. 4 because the Defendant had raised an issue as to his original entry as a licencee.

The evidence of the Plaintiff shows that the land in question belonged to his father. When his father died, his mother and the entire family switched over their accommodation with the Defendant (the uncle) who was then staying with the grandfather presumably at the latter's request.

Subsequently the Defendant by falsely declaring that he was the sole beneficiary to the Plaintiffs' father's estate, obtained Letters of Administration and in that capacity transferred the property into his own name. Then he proceeded to demolish the house on it and to build the present one.

When the Plaintiff discovered this fraud and informed the land office, the Collector of Land Revenue held a further enquiry and at the end of which he cancelled the Letters of Administration issued to the Defendant and retrans- ferred the land to the Plaintiff.

The Plaintiff thereafter made several requests to the Defendant to vacate the premises but he refused, hence this application. Having heard the various witnesses I have arrived at the following factual conclusions:

(i) That the Plaintiff's father was the registered owner of the land;
(ii) That the Defendant had by falsely representing that he was the sole beneficiary to the Plaintiff's father's estate obtained the L/A;
(iii) That in such capacity he transferred the Plaintiff's father's land into his own name;
(iv) That the L/A was subsequently revoked by the Collector of Land Revenue and the ownership restored to the Plaintiff;
(v) That there was no licence from any legally competent person at the time of the Plaintiff's father's death given to the Defendant, and, if at all the consent of the Plaintiff's grandfather to the Defendant's original entry is to be construed as a licence, then that licence had been effectively terminated by the Plaintiff;
(vi) That at the time of rebuilding his house on the land he was aware that he was not the sole beneficiary and therefore not entitled to the Plaintiff's father's land.

In the earlier case of *Bristol Corpn. v. Persons unknown* [1974] 1 ALL ER, Pennycuick V.C. appeared to have made a distinction between a person who had entered into possession of the land without licence and one who entered with a licence but remains in occupation after such licence had been terminated. His Lordship went on to say at p. 596 of the judgment -

> Let me say at once that this order would no doubt be utilised nor an order made under it in the case envisaged in the note, namely, where there has been a grant of a licence for a substantial period and the licensee holds over after the determination of the licence ...

This view however was dissented from in the Court of Appeal case, *Greater London Council v. Jenkins* [1975] 1 ALL ER 354. At p. 356 of the judgment, Lord Diplock observed:

> In the course of his judgment in that case Pennycuick V.C. did suggest that the judge or the court had a discretion whether to permit this summary procedure to be used in cases where there had been, as in this case clearly, a licence to occupy originally. For my part, I am unable to see that the court has any discretion to prevent a plaintiff using this procedure where the circumstances are those described in the rule. So, while agreeing, as I do, with Pennycuick V.C.'s construction of the rule, I personally would disagree that the court has any discretion to prevent the use of this procedure where circumstances are such as to bring them within its term.

At p. 358 of the same judgment, Cairns L.J. expressed a similar view on the application of RSC O. 113 (our O. 89) in the following passage:

> In my view it is impossible so to construe CCR Ord 26, or the corresponding RSC Ord 113, as to exclude from either order a trespasser who has previously been a licensee of any particular class ...

It would appear that the summary procedure against a former licensee is maintainable under O. 89.

Be it so, after the Supreme Court case of *Bohari bin Taib & Ors. v. P.T.G. Selangor* [1991] 1 MLJ 343, it is now clear that the summary procedure is not the proper order to be resorted to in cases involving triable issues which could not be resolved by affidavit evidence alone.

In the present case, I have by resorting to the procedure under O. 28 r. 4 Rules of High Court afforded both parties the opportunity to present their evidence, *viva voce* and to argue the issue raised by the Defendant fully in open court.

As I have found as a fact earlier that the Defendant had occupied the Plaintiff's land without or alternatively on an expired licence and had thereafter attempted to cheat the Plaintiff by making a false statement to the Collector of Land Revenue, I am making the order of possession as prayed for by the Plaintiff. The Defendant is to vacate the premises on or before 3 months from the date hereof.